***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-1237

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P/S.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA,

:

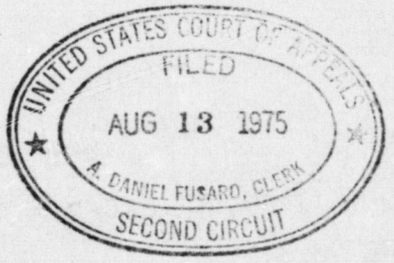
-against- Docket #75-1237

WILLIAM DREW,

Appellant-Defendant. :

----------X

BRIEF and appendix OF APPELLANT WILLIAM DREW

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket #75-1237

-against-

WILLIAM DREW,

Appellant-Defendant.

BRIEF OF APPELLANT WILLIAM DREW

This is an appeal by the defendant-appellant William Drew from the judgment of conviction entered against him after a jury trial presided by District Judge Dudley B. Bonsal.

Drew was convicted on counts seven through thirteen for violating section 10 (b) (5) and rule 10 (b) (5) of the Securities Exchange Act of 1934, with respect to the sale to the public of Ellenvest stock during the year 1971. Drew was also convicted of count one - the conspiracy count - with respect to the very same substantive acts involved in the other counts.

Drew received a six month prison sentence, and was admitted to

bail pending appeal. A timely notice of appeal was filed. The author of this brief was his assigned counsel both at the trial and on this appeal.

Three co-defendants - Richard Orpheus, Eric Blitz, and Peter Horvat - were also convicted of various counts at this five week multi-defendant, multi-count securities fraud trial. Their appeal is simultaneously before this Court.

One co-defendant - Robert Rosan - was acquitted by the jury. All of the other co-defendants pleaded guilty prior to trial, except co-defendant Robert Turco, whose trial was severed from the others.

Drew was originally named in each of the first eighteen counts. The jury acquitted him on counts fourteen to eighteen, which counts charged a violation of the mail fraud act. 18 USC 1341. At the close of the government's case, the district court dismissed counts two through six, which counts charged a violation of section 17 of the Securities Act of 1933.

Count nineteen did not name Drew. Count twenty did not name Drew, and was severed as to a co-defendant. Counts twenty-one through twenty-four named only a co-defendant, who pleaded guilty prior to trial.

## THE INDICTMENT

The indictment is eighteen pages in length, and is set forth in full in

the appendix filed by several of the other appellants.

Counts seven through thirteen charged that Drew, together with numerous co-defendants, violated both section 10 (b) (5) and rule 10(b)(5) of the Securities Exchange Act of 1934 in that they committed fraud in the public sale of Elinvest stock as follows:

| COUNT | DATE | PERSON | SHARES PURCHASED |
|---|---|---|---|
| 7 | 6/4/71 | Matthew Peterson | 100 |
| 8 | 6/9/71 | Astron Fund, Inc. | 25,000 |
| 9 | 6/10/71 | Eugene Graziano | 100 |
| 10 | 6/11/71 | Mike Separ | 200 |
| 11 | 6/29/71 | H. Barrie Morrison | 15,000 |
| 12 | 6/29/71 | Charles Berlin | 10,000 |
| 13 | 7/8/71 | Archibald W. Denny, Jr. | 200 |

Count One, in boiler plate language too well known to this Court, charges that Drew together with numerous co-defendants and co-conspirators, did conspire in 1971 with respect to the sale to the public of Elinvest stock, to violate section 17 of the Securities Act of 1933, section 10 (b)(5) and rule 10 (b) (5) of the Securities Exchange Act of 1934, and the mail fraud statute - 18 USC 1341.

## STATUTES INVOLVED

The above mentioned statutes are very well known to the members of this Court, and need not be set forth in full. This appeal does not involve any question of statutory construction. Also this appeal does not involve any constitutional provisions.

## OPINION BELOW

The District Court did not write any opinions in this matter.

## THE PROSECUTION CASE

Reference is made to the briefs of my colleagues filed on behalf of other appellants in this case which sets forth in detail the government's position with respect to the overall conspiracy and to the respective roles of the individual defendants as to the various substantive counts.

William Drew's role was limited to assisting a small group of salesmen who were bent on selling stock registered in the name of Steven Duke (a Yale law professor) through the facilities of the broker-dealer firm of Ridgway McLeod & Associates during the period July 1971. There was no contention at all that Drew was a salesman, broker, dealer, market maker, insider, or underwriter. There was no contention at all that he sold

stock to the general public, or even sold stock to other broker-dealers. The government's contention was that Drew was a muscleman, who utilized strong arm pressure to induce other salesmen to sell to the public. The government's contention is succinctly stated by the District Court in its charge to the jury (R. 3729-3730):

> "The government contends that Drew went to Van Aken's apartment...on a number of occasions to put pressure on the people there, and push them to sell the stock. Then Van Aken testified, as I recall it, that on July 2, 1971, Drew asked him to give Santini a key to the apartment and that on that occasion he threatened Van Aken. Gerstenzang testified that while in Van Aken's apartment Drew told Gladstein to stop drinking and go sell stock and Gerstenzang also testified that Drew told him while they were in the apartment they better call more customers and on another occasion he called him at home and told him he better come back to the apartment. Pollisky, a stock trader, testified that Drew attended a meeting at McCoy's restaurant in which Santini offered to pay Pollisky, in addition to his commission, $50.00 for every 100 shares of Elinvest stock he would sell, and that later Drew called Pollisky and threatened him if he didn't trade Elinvest stock."

The government in summation summarized its evidence against Drew, in part, as follows: (R. 3407-3409):

> "Santini would bring Drew in when necessary to keep everybody in line if necessary, to threaten people, to get them to do what they had to do up there, which was to sell stock, or to get them back to work."
>
> *******
>
> "You have the testimony of Gerstenzang that on one occasion he was threatened by Drew in the apartment, told to get on the phone, to make the calls. On another occasion,...Gerstenzang was at home...Drew got on the phone and said, "you better get back to work, or I will work you over."
>
> *******

"...when Pollisky refused Drew,...Drew gets on the phone to him and he says to him, in effect, "you better put in an order for 500...".

******

"You may find that Mr. Drew operated by the strong arm and the threat, as that was his tool, that was his tool for accomplishing the job."

Erwin Gerstenzang testified that in the Van Aken apartment in July 1971, Drew told Gladstein to stop drinking, or he would take a poke at him. R. 1636.

Gerstenzang testified that Drew told him to get on the telephone, and do some work. Otherwise Drew would work him over. R. 1640. Also he testified that on another occasion Drew told him to come back to the apartment, or he would come out and teach him a lesson. R. 1640-1641.

Norman Pollisky testified that Drew wanted him to purchase for resale 500 shares, and that if he did not do this, Drew would punch him in the mouth. R. 1836, 1838.

George Van Aken testified that Drew threatened him if he (Van Aken) did not permit further use of his apartment for the selling of stock. R. 524. Also Van Aken testified that he saw Julie grab Gladstein. R. 525.

George Van Aken testified that William Drew did <u>not</u> sell any stock.

R. 692.

Van Aken testified that the group of salesmen who were selling Elinvest stock from his apartment in July 1971 were selling stock registered in the name of Steven Duke. R. 692.

William McLeod testified that in July 1971 his firm - Ridgway McLeod & Associates - operated as the selling broker dealer with respect to the Elinvest stock registered in the name of Steven Duke. R. 1504-1505, 1515.

During the course of George Van Aken's sale to the public of Elinvest stock, held in the name of his family, associates, and other nominees, Van Aken utilized the services of several broker dealers - namely, Baron & Co., Inc., R. J. Rosan & Co., Inc., Ridgway McLeod & Associates, and M. J. Wien & Co.

Van Aken carefully and scrupulously kept one selling group separate and apart from the others. As such neither group knew what the others were doing - a common modus operandi for an insider striving to sell huge amounts of securities to the public in violation of law. As such the evidence is crystal clear that the group which operated out of Van Aken's apartment in the summer of 1971, and utilized the brokerage facilities of

Ridgway McLeod & Associates, in no way knew of Van Aken's activities with respect to the several other selling broker dealers.

Yet ironically William Drew was charged and convicted in substantive counts seven through thirteen with the sale to the public of Elinvest stock consummated throught the brokerage firms of Baron & Co., Inc. and R. J. Rosan Co., Inc., and not with sales handled through the firm of Ridgway McCleod & Associates. See page 4 of the government's Bill of Particulars which enumerates the selling brokers in each of counts seven through thirteen, as follows: (2a):

Count 7: Baron & Co., Inc.

Count 8: R. J. Rosan & Co., Inc.

Count 9: Baron & Co., Inc.

Count 10: Baron & Co., Inc.

Count 11: R. J. Rosan & Co., Inc.

Count 12: R. J. Rosan & Co., Inc.

Count 13: Baron & Co., Inc.

However, we know from the testimony of George Van Aken and William McLeod, and the government exhibits of affirmations in support of their testimony, that the group which sold out of Van Aken's apartment that summer did not utilize the services of either Baron & Co., Inc. or

R. J. Rosan & Co., Inc. This group sold only through Ridgway McLeod & Associates. Interestingly enough the same page 4 of the government Bill of Particulars shows that counts three through six involved sales made through Ridgway McLeod & Associates. However, the District Court did dismiss counts two through six at the close of the government's case. As such we find that William Drew was convicted on count seven through thirteen for substantive violations of section 10 (b)(5) with regard to sales with which he and his group had absolutely no connection.

## THE DEFENSE CASE

William Drew did not testify. R. 2475. He called only one witness, Professor Steven Duke of the Yale Law School. There had been testimony that Duke was in Van Aken's apartment at the time of the selling activities of his stock. However, the good professor asserted his Fifth Amendment privileges, and declined to testify on the grounds of possible self-incrimination. R. 2269-2271.

In summation Drew's counsel argued that the evidence did not show any selling activities on his behalf, and that the testimony as to strong arm tactics came from sources which were not worthy of belief.

## POINT ONE

### THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE SUBSTANTIVE CONVICTIONS ON COUNTS SEVEN THROUGH THIRTEEN

Counts seven through thirteen charged Drew with substantive violations of section 10(b)(5) and rule 10(b)(5) of the Securities Exchange Act of 1934, with regard to seven specific sales of stock in June and early July 1971, which sales were consummated through the brokerage firms of Baron & Co., Inc. and R. J. Rosan & Co., Inc. See page 4 of the government's Bill of Particulars. 2a.

Yet we know from the testimony of George Van Aken and William McLeod, together with the supporting confirmations and other transfer documents, that the group which sold securities out of Van Aken's apartment in July of 1971, was selling only the stock registered in the name of Steven Duke, and was selling solely through the brokerage facilities of Ridgway McLeod & Associates.

The facilities of R. J. Rosan & Co., Inc. were utilized by the co-defendant Robert Rosan, who was acquitted by the jury, and by co-appellant Eric Blitz, whose posture in this case is totally different from that of Drew and the other appellants. The brokerage facilities of Baron & Co., Inc. were used solely by the co-appellant Peter Horvat, who was a

salesman for Baron.

Ironically the District Court dismissed counts three through six, which counts actually charged the sales made through the offices of Ridgway McLeod & Associates.

As such there just was no evidence at all, nor could there ever be, that William Drew violated the securities laws by the sales to the various persons named in the seven counts of counts seven through thirteen of the indictment. Such sales were completely separate and apart from whatever activities Drew may have been involved that summer. Perhaps Drew should have been held accountable in counts three through six for his deeds and words. However, the dismissal of these relevant counts by the District Court does not permit a substitution of other counts which have totally no relevance at all to the activities of Drew. Drew can be held to explain for his selling activities, and arguably, for those who were with him in Van Aken's apartment. However, he cannot be held accountable, and convicted, of substantive violations, for selling activities involving salesmen, securities, and customers, of which he has absolutely no knowledge, or even hint of their very existence.

The Pinkerton concept (328 U.S. 640, 645) was not designed to go quite that far. In the recent case of United States v. Sperling, 506 F.2d 1323, 1341-1342 (CA-2, 1974), this Court has placed some limitations upon

the use of Pinkerton with respect to its use in upholding substantive convictions. This Court cautioned that Pinkerton should be limited to instances where there is no evidence that the defendant committed the substantive offense. As such one who actually agrees with another that a crime should be committed is held accountable for that offense, no matter who commits it. However, both Sperling and our case involve the converse situation. The government introduced evidence that Drew participated in the selling activities of the Ridgway McLeod group. Its activities furnished the basis of substantive counts three through six. As such it was the "conspiracy that in some instances must be inferred largely from the series of criminal offenses committed." 506 F.2d at 1342.

In following the limitation upon Pinkerton, placed by this Court in Sperling, we cannot use the instances of a general conspiracy to substantiate the substantive convictions on counts seven through thirteen, about which there was no evidence of Drew's participation, when the evidence of Drew's participation related to the substantive counts three through six.

The testimony of Van Aken made it clear that he carefully kept one selling group apart from the other. None of them knew, or could ever have suspected, that there would be other selling groups. As such it was just not in any way feasible for Drew or his group to have ever dreamt that Van Aken was using other brokerage facilities to dispose of their stock.

Also requisite knowledge of the wrongdoing is a necessary element as to the substantive charge. In order to convict Drew of being an aider and abettor, it is necessary that the evidence show that he had requisite knowledge as to the illegal nature of the securities being offered to the public, and the illegal method by which it was being sold to the public. United States v. Tavoularis, 515 F.2d 1070, 1074 (CA-2, 1975); United States v. Hysohion, 448 F. 2d 343, 347 (CA-2, 1971); United States v. Steward 451 F. 2d 1203, 1207 (CA-2, 1971). Also see footnote 9, at 515 F.2d at 1074, citing United States v. Feola, 95 S. Ct. at 1265.

## POINT TWO

IT WAS ERROR FOR THE DISTRICT COURT TO HAVE DENIED DREW'S REQUEST TO CHARGE #14. LIKEWISE IT WAS ERROR FOR THE DISTRICT COURT TO PERMIT ORPHEUS' GRAND JURY TESTIMONY TO BE RE-RECEIVE AS SUBSTANTIVE EVIDENCE AS AGAINST DREW

The prosecution was very concerned that none of its witnesses were able to testify that they saw William Drew receive any money for any of his activities. Of course Drew himself did not testify. Whenco-defendant Richard Orpheus testified, he denied seeing Drew receive any moneys. Of course the prosecution wanted to show that he received money, just as every one else did in this case. Obviously only the receipt of money would show whether he really did join the conspiracy.

In this regard the prosecution utilized co-defendant Richard Orpheus' prior grand jury testimony to fill that particular crucial gap. In cross-examination the prosecution confronted Orpheus with his prior testimony before the grand jury that he had seen Santini give money to Drew. (6a-7a):

'Q. Do you recall an instance where Mr. Drew received money in an envelope or received an envelope from Santini at or near McLeod's?

A. I never seen that.

Q. Let me direct your attention to your grand jury testimony, at page 66, under oath. "So you get the money and you go to McLeod and the money would be in an envelope and then Mr. Santini would call you and Mr. Gladstein and Mr. Gerstenzang and Mr. Drew in, one by one, and pay each one of you separately in the presence of each other, is that correct?

A. Right, according to what they did, right."

Q. Now, do you recall giving that answer to that question in the grand jury?

A. I guess I did, yes. "

At this point Drew's counsel asked the Court for a limiting construction to the jury that the question and and answer put to Orpheus before the grand jury be received solely as against him with respect to his credibility, as follows: (7a):

"MR. WALES:

Your Honor, could I have a limiting construction that this question and answer were received solely with regard to the credibility -

MR. WALKER:

Objection.

THE COURT:

Please forget it.

MR. WALES;

I do think -

THE COURT:

Your application is denied."

It is apparent that the District Court made short shrift of defense counsel's request that the evidence be received solely as against Orpheus, and not as against Drew.

In line with the same position, Drew's counsel submitted his request to charge #14, which request reads as follows (3a), and was denied by the District Court. (R. 3442):

> "Orpheus testified at the trial he denied any knowledge as to whether Drew received any money from the proceeds of the sale of Elinvest stock.
> Orpheus admitted on cross-examination that he had previously testified before the grand jury that he knew Drew had received money from the proceeds of the sale of Elinvest stock. You may consider Orpheus' grand jury testimony only as against Orpheus on the question of Orpheus' knowledge. You may not consider Orpheus' grand jury testimony as evidence against Drew on the question of whether Drew in fact received any money from the sale of Elinvest stock."

This single piece of evidence that Drew supposedly received money for his activities was so crucial to the government's case against Drew that it was the only piece of evidence that the government could rely upon in its summation to the jury to show that Drew in fact was part of the selling group, and was being compensated for his efforts. In this regard the government stated in summation (9a-10a):

> "Drew was working on this manipulation and Drew was getting money, getting some of the money from the transactions, the cashing of the checks for McLeods, and we have the testimony of one of the defendants Orpheus, who got on the witness stand and admitted what he said in the grand jury was true, that what happened was that Drew, along with the others, was up there, lining up

for the envelopes when Santini was parceiling out the money"

In a series of opinions this Court has held that the prior inconsistent grand jury testimony of a trial witness who is available for cross-examination, may be received as affirmative proof as to the truth of the statement itself, and is not just admissible solely for impeachment purposes. United States v. De Sisto, 329 F. 2d 929, 932-934 (CA-2, 1964); United States v. Nuccio, 373 F. 2d 168, 172 (CA-2, 1967); United States v. Tavares, 512 F. 2d 872, 874-875 (CA-2, 1975). In fact it can be said that this rule has been originated and developed by this particular Court, and Judge Friendly was its father.

All of the reported cases deal with the situation where the witness in question is either a prosecution witness, or where the witness is the defendant himself, whose prior grand jury testimony is being received substantively as against himself. We do not have any reported opinions where the witness is a co-defendant, testifying on behalf of himself, and the prior grand jury testimony is being utilized substantively as against another defendant on trial. As this narrow issue is still open, I do submit that the DeSisto doctrine not be extended to cover this particular situation. It is one thing for a defendant to be confronted with his own prior grand jury testimony, or the testimony of a prosecution witness who is specifically called to testify against him. It is a far different situation for a defendant

to be burdened with the prior grand jury testimony of a co-defendant at trial, when obviously that co-defendant is testifying for the sole purpose of exculpating himself. Furthermore, the purpose of cross-examination of a testifying defendant is to impeach that trial testimony, and not to utilize out-of-court statements to further implicate another co-defendant.

The reported opinions made clear that the DeSisto doctrine is an exception to the hearsay rule, and so it should not be extended further as is absolutely essential. In our situation the government utilized Orpheus' prior grand jury testimony not for the purpose of impeaching Orpheus, but solely for the purpose of filling in a critical gap in their case against Drew. As this evidence was received during the course of the presentation of the defense evidence, long after the government had rested, the prosecution should not be allowed to utilize this evidence substantively as against Drew.

## POINT THREE

## THE EVIDENCE TO SUSTAIN DREW'S CONSPIRACY CONVICTION WAS INSUFFICIENT

The prior recital of the government's evidence as to the participation of William Drew shows that he had absolutely no contact with the selling public, nor did he in any way either buy or sell the securities in question. Apparently his participation was limited to forcibly inducing others to sell securities.

However, there is an absolute dearth of evidence to show that his pressure to sell included a pressure to sell fraudulently. There is absolutely no evidence to show that he ever indicated to any one what to say or what to do in their dealings with the buying public. Also there just is no evidence to show that he had any knowledge of the wrongdoing that was being committed either by Van Aken and/or his nominees, or by Ridway McLeod and the persons who were selling on behalf of that firm.

Requisite knowledge of the wrongdoing is a necessary element of both a conspiracy charge and a substantive charge. In order to convict Drew of either being a conspirator, or an aider and abettor, it is necessary that the evidence show the requisite knowledge as to the illegal nature of the securities being offered to the public, and the illegal method by which it

was being sold to the public. United States v. Tavoularis, 515 F.2d 1070, 1074 (CA-2, 1975); United States v. Hysohion, 448 F.2d 343, 347 (CA-2, 1971); United States v. Steward 451 F.2d 1203, 1207 (CA-2, 1971). Also see footnote 9, at 515 F.2d at 1074, citing United States v. Feola, 95 S. Ct. at 1265.

At most the evidence shows that Drew was a pushy fellow who was perhaps violating the assault statute of the State of New York. However, the evidence just does not show that he had the requisite knowledge of the scope of the conspiracy, and requisite knowledge as to the nature of the securities being sold, to show that he was either a conspirator or an aider and abettor.

## CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

Dated: August 6, 1975

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## INDEX TO APPENDIX

1a - Judgment

United States of America vs.

# United States District Court

DEFENDANT: WILLIAM DREW

Southern District of New York

DOCKET NO. ➤ 74 Cr.1226

## JUDGMENT AND PROBATION/COMMITMENT ORDER AO-245 (6/74)

**COUNSEL**

In the presence of the attorney for the government the defendant appeared in person on this date ➤ MONTH: 5 DAY: 23 YEAR: '75

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL E. Wales (Name of counsel)

**PLEA**

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

**FINDING & JUDGMENT**

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly by use of means and instrumentalities of interstate commerce and of the mails in connection with the purchase of & sale of securities employ devices, schemes and artifices to defraud, make untrue statements of material facts and omit to state material facts and engage in acts, practices and courses of business which would operate as a fraud and deceit. (T.15, USC, §§78j(b) & 78ff & T. 17, C.F.R. §240.10b-5, T.18, U.S.C., §2.) conspiracy so to do. (Title 18, U.S. Code, §371.)

**SENTENCE OR PROBATION ORDER**

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SIX (6) MONTHS on count 1.
ONE (1) YEAR on each of counts 7 thru 13. Execution of sentence on counts 7 thru 13 is suspended. Defendant is placed on probation for a period of TWO (2) YEARS, to commence upon expiration of confinement imposed on count 1, subject to the standing probation order of this Court.

Bail pending appeal fixed in the amount of $50,000 Personal Recognizance Bond.

**SPECIAL CONDITIONS OF PROBATION**

MICROFILM
MAY 30 1975

**ADDITIONAL CONDITIONS OF PROBATION**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

**COMMITMENT RECOMMEN.**

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

2a - Bill of Particulars

JMW:jp

(a) Count 2: Baron & Co., Inc.

(b) Count 3: Ridgway McLeod & Associates

(c) Count 4: Ridgway McLeod & Associates

(d) Count 5: Ridgway McLeod & Associates

(e) Count 6: Ridgway McLeod & Associates

E. As to Counts 7 through 13

12. With reference to Indictment Counts 7 through 13, the government alleges that Barry Ross, Eric Blitz and Robin Baron are liable on three grounds: as principals, aiders and abettors, and members of the conspiracy.

13. With reference to Indictment Counts 7 through 13, the government alleges that the following were the brokers which, as principal or as agent, sold Elinvest stock to the persons enumerated in these counts:

(a) Count 7: Baron & Co., Inc.

(b) Count 8: R. J. Rosan & Co., Inc.

(c) Count 9: Baron & Co., Inc.

(d) Count 10: Baron & Co., Inc.

(e) Count 11: R. J. Rosan & Co., Inc.

(f) Count 12: R. J. Rosan & Co., Inc.

(g) Count 13: Baron & Co., Inc.

F. As to Counts 14 through 18

14. With reference to Indictment Counts 14 through 18, the government alleges that Barry Ross, Eric Blitz and Robin Baron are liable on three grounds: as principals,

DEFENDANT DREW'S REQUEST
TO CHARGE #14

Orpheus testified at the trial he denied any knowledge as to whether Drew received any money from the proceeds of the sale of Elinvest stock. Orpheus admitted on cross-examination that he had previously testified before the grand jury that he knew Drew had received money from the proceeds of the sale of Elinvest stock. You may consider Orpheus' grand jury testimony only as against Orpheus on the question of Orpheus' knowledge. You may not consider Orpheus' grand jury testimony as evidence against Drew on the question of whether Drew in fact received any money from the sale of Elinvest stock.

at McLeod's was used to pay off the various individuals; is that correct?

A Yes.

Q And that would be Santini, Gladstein, Drew and Gerstenzang; is that correct?

MR.RICHMAN: There is no testimony about Drew, your Honor.

MR. WALES: I object.

THE COURT: Who did you understand --

THE WITNESS: The only person that Santini gave money to that I know was me.

Again I can only --

THE COURT: You don't know. He never told you what other people --

THE WITNESS: The only two people that were there with me was Gerstenzang and Gladstein.

THE COURT: You testified --

THE WITNESS: About the hot dog stand.

THE COURT: You saw Santini talking to them and you think he gave them some money?

THE WITNESS: Yes.

THE COURT: All right.

Q Did you see at any time Mr. Drew over there speaking privately with Santini at the time that money was

passed but to you?

A He wasn't there that time.

Q Was he there at any time?

A I don't believe he came to Jersey --

THE COURT: Where is that?

MR. WALKER: Over in New York, Ridgeway, McLeod's?

THE COURT: Over in New Jersey, all right.

A -- with the checks, I don't believe he came over there with the checks.

Q Do you recall any instances where Mr. Drew received money in an envelope or received an envelope from Santini at or near McLeod's?

A I never seen that.

Q Let me direct your attention to your grand jury testimony, at Page 66, under oath.

"Q So you get the money and you go to McLeod and the money would be in an envelope and then Mr. Santini would call you and Mr.Gladstein and Mr.Gerstenzang and Mr.Drew in, one by one, and pay each one of you separately not in the presence of each other, is that correct?

"A Right, according to what they did, right."

Now, do you recall giving that answer to that question in the grand jury?

A I guess I did, yes.

Q At the time that you testified in the grand jury as to that, you were testifying as to your best recollection, is that correct?

A Yes,but you only get paid for what you did.

THE COURT: He isn't questioning that. He is questioning you whether you gave those answers to the grand jury.

THE WITNESS: I did.

Q And that was on January 24, 1973?

A Yes.

Q In the apartment --

MR. WALES: Your Honor, could I have a limiting instruction that this question and answer were received solely with regard to the credibility --

MR. WALKER: Objection.

THE COURT: Please forget it.

MR. WALES: I do think --

THE COURT: Your application is denied.

Q When you answered that question, you were trying to tell the truth as best you could recall it, is that correct?

A The best I could recall.

Q Mr. Orpheus, in the apartment, were there occasions when Mr.Santini and Mr.Drew would be talking to Van Aken and they would tell you --

THE COURT: That is a sort of complicated question, I am afraid, Mr.Walker. You had better break that down.

Q Were there occasions when Santini, Drew and Van Aken would converse together privately in the apartment?

A Again, the apartment was big and we were on one side --

THE COURT: The question is do you recall when you were at the apartment.

Government Summation - 8a



MP 3

Now, there was abundant evident, we submit, against William Drew. Drew and Santini, you may find, worked together, worked together in this fraud, and Santini was up at the apartment. We know about Santini. Santini was up at the apartment. Santini would bring Drew in when necessary to keep everybody in line, if necessary, to threaten people, to get them to do what they had to do up there, which was to sell stock, or to get they back to work.

We have Van Aken's testimony that at the end of the first week up at the apartment, Van Aken was anxious to get this crew out of the apartment, but Santini had requested a key to the apartment, and when Van Akan bucked that idea, Drew told him that he better get a key, better get a key and give a key to Santini so that they could work, and Van Aken didn't argue with Drew, just as Orpheus said, "You don't argue with Santini." You remember his testimony. "You don't argue with Santini." So Van Aken didn't argue with Drew on that occasion.

You have the testimony of Gerstenzang that on one occasion he was threatened by Drew in the apartment, told to get on the phone, to make the calls. On another occasion, Gerstenzang -- you can have his testimony read back -- Gerstenzang was at home, said he didn't feel like coming in that day. Drew got on the phone and said, "You better get back to work, or I'll work you over." He wanted to get him back in

there so that the selling could continue, because Drew had his stake in the outcome.

The testimony of Pollisky -- you heard Norman Pollisky, who was a stock broker, came in and testified that he was present at a meeting at McCoy's with Santini and Drew, and they offered him fifty dollars for every hundred shares he sold, a pay-off.

These men were anxious to pay off a broker so that they could sell the stock. This is evidence of Drew's involvement in the inside of this scheme, of the necessity to get the stock sold, and it proves, I submit to you, his criminal intent and his effort to sell this stock, to foist off this stock to the public, and when Pollisky refused Drew, he refused to take this cash at that time, or he left the matter hanging and wasn't actually putting in the buying that they had requested, Drew gets on the phone to him and he says to him, in effect, "You better put in an order for five hundred." Your recollection controls in this area. I don't recall the exact words he used, but "You better put in a buy order. You better put in an order for five hundred. You better buy some of this stock," because Drew was anxious to see the stock manipulated. Drew was working on this manipulation, and Drew was getting the money, getting some of the money from the transactions, the cashing of the checks over at McLeods, and

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we have the testimony of one of the defendants, Orpheus, who got on the witness stand and admitted what he said in the grand jury was true, that what happened was that Drew, along with the others, was up there, lining up for the envelopes when Santini was parceling out the money.

Now, we submit to you that some of these witnesses, as they testified, Gerstenzang and Pollisky, were nervous about Drew even as they testified on the stand --

MR. WALES: There is no testimony as to that, your Honor. I object to that.

THE COURT: I think I will sustain the objection to that, yes.

MR. WALKER: You may find that Mr. Drew operated by the strong arm and the threat, and that was his tool, that was his tool for accomplishing the job.

Now, the testimony of Peter Horvat -- excuse me -- the testimony against Peter Horvat is clear. Horvat first of all, by his own admission and the testimony that was read to you, worked for Baron & Co. He worked for Robin Baron, whom you may find to be an integral member of this scheme, a member of these fraudulent transactions, a man who was guilty of the crimes here. He worked for Robin Baron, and we know about Baron. We know that Baron took a block of Duke's stock after a series of meetings and that he took this block of stock to

$50 for every hundred shares of Elinvest stock he would sell, and that later Drew called Pollisky and threatened him if he didn't trade Elinvest stock.

Now, the defendant Drew denies that he was in any conspiracy or that he participated in the sale of Elinvest stock. He denies that he sold any shares of Elinvest, and he contends, as I understand it, that his purpose in going to Van Aken's apartment was to accompny his friend, Santini.

Fraud Statute -- and I will tell you more about these in a few minutes -- and with substantive violations of these laws.

Turning first to the defendant Drew, the Government contends, and Mr. Drew denies, that he participated in the fraudulent sale of Elinvest stock and he conspired with others to do so. The Government contends that Drew went to Van Aken's apartment -- you remember when we heard evidence about the sale of stock -- on a number of occasions to put pressure on the people there, and push them to sell the stock. Then Van Aken testified, as I recall it, that on July 2, 1971, Drew asked him to give Santini a key to the apartment and that on that occasion he threatened Van Aken.

Gerstenzang testified that while in Van Aken's apartment Drew told Gladstein to stop drinking and go sell stock and Gerstenzang also testified that Drew told him while they were in the apartment they better call more customers and on another occasion he called him at home and told him he better come back to the apartment.

Pollisky, a stock trader, testified that Drew attended a meeting at McCoy's Restaurant in which Santini offered to pay Pollisky, in addition to his commission,

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.



UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

*Index No.*

UNITED STATES OF AMERICA,

*Plaintiff*

*against*

WILLIAM DREW,

Appellant - *Defendant*

Docket #75- 1237

*AFFIDAVIT OF SERVICE*
*BY* ~~MAIL~~
HAND DELIVERY

*STATE OF NEW YORK, COUNTY OF* New York *ss.:*

*The undersigned being duly sworn, deposes and says:*

*Deponent is not a party to the action, is over 18 years of age and resides at*
Queens, New York

*That on* August 7, 1975, one copy ~~xxx~~ additional copies ~~were~~ of brief & Appendix and on August 11th, 1975 two/ ~~xxxxxxxxxxxxxxxxxxxxxxxxx~~ *deponent served the annexed* ~~xxxxxxxxxxxxxxxxxxxxxxxxx~~ were served

*on* United States Attorney
*attorney(s) for* Plaintiff U.S. Courthouse Annex
*in this action at* 1 St. Andrews Plaza, Foley Sq. New York, N.Y. 10007
*the address designated by said attorney(s) for that purpose by* ~~*depositing*~~ hand delivering *a true copy of same enclosed in a postpaid properly addressed wrapper,* ~~*in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*~~ to a messenger of the firm of Mr. Messenger, 103 Park Ave. New York City, for hand delivery to U.S. Attorney.

*Sworn to before me*
this 11th day of August, 1975

H. Elliot Wales

Lillian Kurtzer

The name signed must be printed beneath

H. ELLIOT WALES
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4129915
Qualified in Kings County
Commission Expires March 31, 1977

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